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Message Text

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12
ACTION EUR-12

INFO OCT-01 ISO-00 CIAE-00 DODE-00 NSAE-00 NSCE-00 SSO-00

USIE-00 INRE-00 PM-04 H-02 INR-07 L-03 NSC-05 PA-01

PRS-01 SP-02 SS-15 DOTE-00 CG-00 ACDA-05 TRSE-00

SAJ-01 MC-02 IGA-01 OMB-01 SAM-01 EB-07 AID-05 /076 W
---------- 081604
O 111009Z OCT 75
FM AMEMBASSY ANKARA
TO SECSTATE WASHDC NIACT IMMEDIATE 1006

C O N F I D E N T I A L SECTION 1 OF 2 ANKARA 7663

E.O. 11652: GDS
TAGS: MARR, PFOR, TU
SUBJ: SUGGESTED TEXT FOR NOTE REBUTTING GOT CLAIM THAT BILATERAL DEFENSE AGREEMENTS ARE INVALID

REFS: (A) ANKARA 6736 DTG 021255Z SEPT 75
(B) ANKARA 6860 DTG 051537Z SEPT 75

1. WHILE IN THE DEPARTMENT LAST WEEK, AMBASSADOR WAS GIVEN A WORKING PAPER PREPARED BY THE OFFICE OF THE LEGAL ADVISOR WITH SUGGESTED ARGUMENTS FOR REBUTTING GOT POSITION BASED ON "PACTA SUNT SERVANDA" THAT CURRENT BILATERAL DEFENSE AGREEMENTS ARE INVALID. WE AGREE THAT A DIPLOMATIC NOTE PRESENTING OUR LEGAL CASE WOULD BE HELPFUL, PARTICULARLY IF WASHINGTON APPROVES OUR RECOMMENDATION (REF B) THAT AT OPENING OF RENEWED NEGOTIATIONS WE URGE GOT TO ACCEPT THE CONTINUING VALIDITY OF THESE AGREEMENTS. WE RECOMMEND PRESENTING SUCH A NOTE TO THE FOREIGN MINISTRY PRIOR TO THE OPENING OF NEGOTIATIONS. WE WOULD NOT WISH THE NEGOTIATIONS THEMSELVES TO FOCUS TOO HEAVILY ON THIS ISSUE, WHICH COULD BOG US DOWN IN PROLONGED AND EVENTUALLY STERILE DISPUTES OVER LAW OF TREATIES INTERPRETATIONS.

2. IN DRAFT DIPLOMATIC NOTE CONTAINED IN FOLLOWING PARAGRAPHS WE HAVE EXTRACTED PORTIONS OF THE L WORKING PAPER WHICH WE
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FEEL WILL BEST SERVE OUR PURPOSES, INDICATED SPECIFIC POINTS WHICH

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WE FEEL REQUIRE FURTHER DOCUMENTATION AND ADDED SOME LANGUAGE OF OUR OWN. SINCE WE WOULD WISH TO GET OUR ARGUMENTS TO INTERESTED GOT OFFICIALS WELL BEFORE NEGOTIATIONS ARE RESUMED, WE WOULD MOST APPRECIATE CLEARED DRAFT NO LATER THAN WEDNESDAY MORNING OCTOBER 15 ANKARA TIME.

3. BEGIN TEXT: THE EMBASSY ETC..... AND HAS THE HONOR TO REFER TO THE MINISTRY OF FOREIGN AFFAIRS NOTE 3932 OF SEPTEMBER 21 WHICH ELABORATES THE GOVERNMENT OF TURKEY'S VIEWS ON THE LEGAL JUSTIFICATIONS FOR ITS DETERMINATION THAT IT CAN NO LONGER CONSIDER ITSELF BOUND BY THE PROVISIONS OF EXISTING BILATERAL AGREEMENTS RELATING TO MUTUAL DEFENSE. IN THESE VIEWS THE USG CANNOT CONCUR, AS HAS BEEN MADE CLEAR BY THE EMBASSY'S NOTES OF JULY 27 AND AUGUST 25, WHICH HAVE FULLY RESERVED ALL U.S. RIGHTS UNDER THE AGREEMENTS GOVERNING OUR SECURITY RELATIONSHIP AND UNDER INTERNATIONAL LAW.

4. THE GOVERNMENT OF TURKEY'S POSITION, IN ESSENCE, IS THAT THE U.S. ACTIONS CONSTITUTE A TOTAL ARMS EMBARGO, IN MATERIAL BREACH OF U.S. OBLIGATIONS TO TURKEY UNDER ARTICLE III OF THE NORTH ATLANTIC TREATY AND ARTICLE XXI OF THE DEFENSE COOPERATION AGREEMENT (DCS), WHICH INCORPORATES THE OBLIGATIONS OF THE NORTH ATLANTIC TREATY BY REFERENCE. THE GOVERNMENT OF TURKEY DEEMS ITSELF ENTITLED, IN RESPONSE, TO CONSIDER THE DCA AND RELATED AGREEMENTS AS BEING NO LONGER VALID.

5. THE USG AGREES WITH THE PREMISE THAT ONE OF THE BASIC PRINCIPLES OF INTERNATIONAL LAW IS THAT OF "PACTA SUNT SERVANDA", WHICH REQUIRES THAT TREATIES MUST BE PERFORMED IN GOOD FAITH. IT IS THE FIRM CONVICTION OF THE USG THAT IT HAS CONTINUOUSLY ACTED IN GOOD FAITH TOWARD THE GOVERNMENT OF TURKEY WITH REGARD TO ITS OBLIGATIONS UNDER THE NORTH ATLANTIC TREATY AND THE DCA.

6. THE GOVERNMENT OF TURKEY HAS MAINTAINED THAT U.S. ACTIONS CONSTITUTE A VIOLATION OF ARTICLE III OF THE NORTH ATLANTIC TREATY, WHICH PROVIDES IN PART: "...THE PARTIES...BY MEANS OF CONTINUOUS AND EFFECTIVE SELF-HELP AND MUTUAL AID, WILL MAINTAIN AND DEVELOP THEIR INDIVIDUAL AND COLLECTIVE CAPACITY TO RESIST ARMED ATTACK." AT THE TIME OF U.S. RATIFICATION, THE CONFIDENTIAL

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PRESIDENT AND SECRETARY OF STATE ACHESON IN PUBLIC MESSAGES MADE IT CLEAR THAT ARTICLE III DID NOT ITSELF "OBLIGATE ANY PARTY TO MAKE ANY SPECIFIC CONTRIBUTION TO THE DEFENSE CAPACITY OF ANY OTHER PARTY AT ANY PARTICULAR TIME OR OVER ANY GIVEN PERIOD OF TIME." DURING NEGOTIATIONS OF THE TREATY NO COMMITMENTS OF ANY KIND WERE MADE BY THE UNITED STATES TO FURNISH MILITARY ASSISTANCE, AND THE EUROPEAN NEGOTIATORS WERE CONSTANTLY REMINDED THAT THE IMPLEMENTATION OF ARTICLE III

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BY THE UNITED STATES WOULD DEPEND UPON CONGRESSIONAL ACTION. THIS POSITION OF THE UNITED STATES WAS KNOWN TO THE GOVERNMENT OF TURKEY PRIOR TO TURKISH ACCESSION TO THE TREATY. (COMMENT: WE BELIEVE WE SHOULD STATE HWO GOT WAS MADE AWARE OF THIS POSITION OR LAST SENTENCE SHOULD BE DELETED.)

7. ARTICLE III, THEN, DOES NOT REQUIRE THE UNITED STATES OR ANY ALLY TO PROVIDE ANY PARTICULAR FORM OF "CONTINUOUS AND EFFECTIVE MUTUAL AID" AND IT MAY BE IMPLEMENTED IN A NUMBER OF WAYS. THOUGH THE RECENT CONGRESSIONAL RESTRICTIONS DIMINISHED THE U.S. CAPABILITY TO LEND MILITARY ASSISTANCE TO TURKEY, EVEN DURING THE PERIOD OF RESTRICTIONS THE U.S. CONTINUED TO SUPPORT THE TURKISH DEFENSE EFFORT THROUGH OUR JOINT DEFENSE EFFORTS IN NATO, INCLUDING CONTRIBUTIONS TO TURKISH INFRASTRUCTURE PROJECTS, INTELLIGENCE EXCHANGES IN NATO, AND CONTINUED WILLINGNESS TO MAINTAIN AND SUPPORT EXTENSIVE DEFENSE FACILITIES IN OUR COMMON DEFENSE INTERESTS; AND THROUGH AN OFFER OF $50 MILLION IN MILITARY AFFISTANCE PROGRAM FUNDS, AN OFFER WHICH WAS NOT ACCEPTED BY TURKEY. THE UNITED STATES HAS THUS REMAINED ACTIVELY ENGAGED IN NUMEROUS ALLIANCE AND BILATERAL ACTIVITIES IN IMPLEMENTATION OF ARTICLE III AND CONSEQUENTLY DOES NOT BELIEVE THAT IT IS IN DEFAULT OF THE "MUTUAL AID" REQUIREMENTS OF ARTICLE III BY VIRTUE OF THE RECENT CONGRESSIONAL SUSPENSION OF MILITARY ASSISTANCE PROGRAMS TO TURKEY.

8. FURTHER, IT IS INACCURATE TO SAY THAT THE GOVERNMENT OF THE UNITED STATES HAS PLACED DELIBERATE OBSTACLES IN TURKEY'S PATH IN ITS EFFORTS TO MAINTAIN AND DEVELOP ITS CAPACITY TO RESIST ARMED ATTACK BY MEANS OF "SELF-HELP". ALTHOUGH THE TRANSIENT RESTRICTIONS IMPOSED BY CONGRESSIONAL ACTION INTERRUPTED THE DIRECT FLOW OF DEFENSE MATERIEL FROM THE U.S. TO TURKEY, TURKEY REMAINED OTHERWISE UNENCUMBERED TO CONFIDENTIAL

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EXERCISE ITS RIGHT TO SELF-HELP. (COMMENT: WE THINK THE LEGAL ARGUMENTS IN THIS NOTE NEED TO BE STRENGTHENED NOT RPT NOT WITH REGARD TO CUT-OFF OF GRANT ASSISTANCE AND CONCESSIONAL SALES, WHICH WE THINK CAN BE LEGALLY JUSTIFIED BY RELIANCE ON CONGRESSIONAL CAVEAT LANGUAGE IN DCA, BUT IN REGARD TO EMBARGO ON ALL PURCHASES OF ARMS. WE THEREFORE HOPE FURTHER LEGAL ARGUMENTS CAN BE ADDED TO THIS OR SUCCEEDING PARAGRAPH.)

9. THE GOVERNMENT OF TURKEY HAS APPARENTLY FURTHER TAKEN THE POSITION THAT MEMBERS OF NATO ARE OBLIGATED BY ARTICLE 3 OF THE NORTH ATLANTIC TREATY TO ISSUE

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INFO OCT-01 ISO-00 CIAE-00 DODE-00 NSAE-00 NSCE-00 SSO-00

USIE-00 INRE-00 PM-04 H-02 INR-07 L-03 NSC-05 PA-01

PRS-01 SP-02 SS-15 DOTE-00 CG-00 ACDA-05 TRSE-00

SAJ-01 MC-02 IGA-01 OMB-01 SAM-01 EB-07 AID-05 /076 W
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TO SECSTATE WASHDC NIACT IMMEDIATE 1007

C O N F I D E N T I A L SECTION 2 OF 2 ANKARA 7663

EXPORT LICENSES FOR MATERIEL NECESSARY TO MAINTAIN AND DEVELOP ANOTHER ALLY'S DEFENSE CAPACITY, AND THAT THE OBLIGATION IS INCORPORATED BY REFERENCE INTO THE DCA AS A MATERIAL CONDITION FOR THE VALIDITY OF THE DCA. NEITHER AN ALLIANCE RELATIONSHIP NOR THE PARTICULAR OBLIGATIONS OF NATO MEMBERS TOWARDS ONE ANOTHER UNDER ARTICLE 3 OF THE NORTH ATLANTIC TREATY CAN BE DEEMED TO COMPEL ONE MEMBER STATE TO CONTINUE TO FUNCTION AS A SOURCE OF SUPPLY FOR MILITARY MATERIEL TO ANOTHER DURING A TIME WHEN THE LATTER IS USING PREVIOUSLY SUPPLIED MATERIEL IN OPERATIONS UNRELATED TO ALLIANCE PREPAREDNESS AND OUTSIDE THE SCOPE OF ALLIANCE OBJECTIVES, AND IT MAY REASONABLY BE ANTICIPATED THAT NEWLY-SUPPLIED MATERIEL MIGHT BE USED IN A LIKE FASHION.

10. THE GOVERNMENT OF TURKEY CANNOT IGNORE THAT ITS ACTIONS IN THE SECOND MILITARY PHASE ON THE ISLAND OF CYPRUS HAVE SHAPED SUBSEQUENT CONGRESSIONAL REACTON AND THE PRESENT CONTEXT OF OUR BILATERAL DISCUSSIONS. THE GOVERNMENT OF TURKEY IS WELL AWARE THAT ITS UNAUTHORIZED USE ON CYPRUS OF U.S.-SUPPLIED MILITARY MATERIEL FURNISHED UNDER OUR BILATERAL AID PROGRAM CONSTITUTED A BREACH OF THE AGREEMENTS GOVERNING THE PROGRAM AND, SPECIFICALLY, OUR BILATERAL AID AGREEMENT OF JULY 12, 1947 AND THE 1960 EXCHANGE OF NOTES RESPECTING THE USE OF U.S.- SUPPLIED ASSISTANCE ON
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CYPRUS. (COMMENT: WHILE EMBASSY BELIEVES THIS ARGUMENT SHOULD BE INCLUDED, WE TAKE NOTE OF THE FACT THAT THIS WOULD BE FIRST TIME IT HAS BEEN OFFICIALLY CONVEYED IN WRITING TO GOT. USE OF THIS ARGUMENT SHOULD THEREFORE HAVE HIGH LEVEL APPROVAL. REFERENCE TO THE 1964 JOHNSON LETTER, WHICH IS VERY MUCH A RED FLAG HERE, WOULD BE A MAJOR DIPLOMATIC BLUNDER AND WOULD, IN OUR OPINION, ADD LITTLE TO THE LEGAL ARGUMENT. WE HAVE ALSO OMITTED WORKING PAPER'S STATEMENT THAT MILITARY INTERVENTION WAS NOT PERMITTED BY 1960 ZURICH TREATY OF GUARANTEE, WHICH WE BELIEVE TO BE AN EXTREMELY VULNERABLE ARGUMENT IN VIEW OF CIRCUMSTANCES IN WHICH THIS AGREEMENT WAS NEGOTIATED AND THE UNDERSTAND-INGS OF THE PARTIES AT THE TIME. THE ARGUMENT SHOULD NOT REPEAT NOT BE MADE THAT TURKS DID NOT HAVE RIGHT TO INTER-VENE MILITARILY BUT RATHER THAT THEY CARRIED INTERVENTION BEYOND THAT PERMITTED BY ZURICH TREATY.)

11. THE GOVERNMENT OF TURKEY MAINTAINS THAT AS A RESULT OF THE "EMBARGO DECISION", THE USG HAS FAILED TO CARRY ON THE OBJECT AND PURPOSE OF THE DCA, ARTICLE XXI OF WHICH PROVIDES IN PART: "THE GOVERNMENT OF THE UNITED STATES WILL PROVIDE, SUBJECT TO CONGRESSIONAL ACTION, SUPPORT TO THE TURKISH DEFENSE EFFORT AT A LEVEL TO BE DETERMINED THROUGH APPROPRIATE PROCESS OF CONSULTATION."

12. THE UNITED STATES IS OBLIGATED BY ARTICLE XXI TO PROVIDE SUPPORT TO THE TURKISH DEFENSE EFFORT, BUT THE DCA DOES NOT PRESCRIBE ANY PARTICULAR LEVEL OR KIND OF SUPPORT. THE INSERTION OF THE CAVEAT IN THIS ARTICLE WAS INTENDED TO ALERT TURKEY TO THE FACT THAT SUCH SUPPORT WAS SUBJECT TO CONGRESSIONAL ACTION. SINCE THE POSSIBILITY OF NEGATIVE CONGRESSIONAL ACTION WAS EXPRESSLY PROVIDED FOR IN ARTICLE XXI, ITS OCCURRENCE CANNOT CONSTITUTE A BREACH OF THAT ARTICLE.

13. EVEN WERE THE U.S. ACTIONS CONSIDERED, ARGUENDO, TO CONSTITUTE A BREACH OF ITS OBLIGATIONS TO TURKEY UNDER THE NORTH ATLANTIC TREATY OR THE DCA, THE SWEEPING, UNILATERAL RETALIATORY ACTION BY TURKEY IN TERMINATING EXISTING SECURITY AGREEMENTS DOES NOT CONSTITUTE THE INTERNATIONALLY ACCEPTED REMEDY. TO INVALIDATE THESE AGREEMENTS WITHOUT REGARD TO THEIR PROVISIONS ON DURATION, REVIEW, AMENDMENT
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AND TERMINATION, CANNOT BE JUSTIFIED IN THE NAME OF "PACTA SUNT SERVANDA." RATHER, SPOKESMEN FOR BOTH NATIONS IN MULTILATERAL DISCUSSIONS OF THE LAW OF TREATIES HAVE INSISTED THAT, IN THE EVENT OF DISPUTE OVER BREACH OF AN

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INTERNATIONAL AGREEMENT, UNILATERAL ACTION MUCH BE RESTRICTED
BY THE OBSERVANCE OF STRICT PROCEDURES, INCLUDING NEGOTIATION
AND RECOURSE TO COMPULSORY DISPUTE SETTLEMENT, IF REQUIRED,
PRIOR TO TERMINATION FOR BREACH. (COMMENT: THE TURKISH
NOTE RELIES UPON THE LANGUAGE OF ARTICLE 60 OF THE 1969
VIENNA CONVENTION OF THE LAW OF TREATIES, WHICH IN FACT
PERMITS THE AGGRIEVED PARTY TO TERMINATE A BILATERAL TREATY
FOR MATERIAL BREACH BY THE OTHER PARTY. OUR COUNTER
ARGUMENT SHOULD BE ACCOMPANIED BY APPROPRIATE CITATIONS.)
THE INTEREST IN STABILITY OF TREATIES WHICH THE TWO GOVERNMENTS
HAVE SOUGHT TO SERVE IN HOLDING TO THESE VIEWS IS PARTICULARLY
IMPORTANT IN THE CONTEXT OF THEIR INTERRELATED BILATERAL AND
MULTILATERAL DEFENSE RELATIONSHIP. NOT ONLY DO OTHER NATO
MEMBERS HAVE A LEGITIMATE INTEREST IN THE LEGAL INTER-
PRETATIONS ON WHICH THE CHARGE OF MATERIAL BREACH IS BASED, BUT
ALSO THE VITAL SECURITY INTERESTS OF ALL THE OTHER PARTIES ARE
ADVERSELY AFFECTED BY THE UNILATERAL ACTION TAKEN BY THE
GOVERNMENT OF TURKEY ON THE BASIS OF THE CHARGE. FURTHER,
THE U.S. ACTIONS HAVE NOT BEEN AS SWEEPING AS THE GOVERNMENT
OF TURKEY'S DECLARATION THAT BILATERAL AGREEMENTS ARE NO
LONGER LEGALLY VALID. THIS ACTION THEREFORE VIOLATES THE
INTERNATIONAL LEGAL REQUIREMENT THAT RESPONSE TO A TREATY
VIOLATION BE PROPORTIONATE. (COMMENT: CITATIONS ARE AGAIN
NECESSARY HERE.) TOTAL TERMINATION OF AGREEMENTS UNDER
THESE CIRCUMSTANCES IS NOT A PROPORTIONATE RESPONSE. THE
"EMBARGO DECISION" WHICH RESULTED FROM AN ACT OF CONGRESS
WAS NOT, BY ITS OWN TERMS, OF A PERMANENT NATURE, NOR
GIVEN THE FACTS CITED ABOVE, WAS IT TOTAL. FURTHER,
SUBSEQUENT ACTION OF THE U.S. CONGRESS HAS NOW REMOVED THE
BASIS FOR CONSIDERING THE SUSPENSION PERMANENT. CONSEQUENTLY,
TERMINATION OF THE U.S.-TURKISH AGREEMENTS, EXCEPT AS
PROVIDED IN THE PROVISIONS OF THE AGREEMENTS THEMSELVES,
WOULD NOT BE A PROPORTIONATE RESPONSE.

14. THE UNITED STATES THUS BELIEVES THAT THERE SHOULD BE A
SUFFICIENT AREA OF COMMON LEGAL GROUND, AS WELL AS MUTUALITY OF
INTERES TO PERMIT THE COMPLETE RESTORATION OF ALL BILATERAL DEFENSE
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AGREEMENTS BETWEEN THE TWO GOVERNMENTS. THE UNITED STATES
ANTICIPATES THAT THE ATMOSPHERE RESULTING FROM REINSTITUTION
BY THE GOVERNMENT OF TURKEY OF EXISTING BILATERAL AGREEMENTS
WILL GREATLY FACILITATE THE CONDUCT OF RENEWED DISCUSSIONS
ON THEIR FUTURE SECURITY RELATIONSHIP AND THE RENEWED FLOW
OF MILITARY MATERIEL TO TURKEY.

15. COMPLIMENTARY CLOSE. END TEXT.
MACOMBER

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